

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES, PETITIONER,

—v—

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**CHRONOLOGICAL LIST OF IMPORTANT
DOCKET ENTRIES**

Date	Proceedings
Oct. 18, 1971	Court appointed Malcolm H. Mackey as counsel for Defendant.
Oct. 18, 1971	Defendant pleaded not guilty, counts 1-8 and trial date set.
Nov. 16, 1971	Jury trial 1st day.
Nov. 17, 1971	Further jury trial, jury returns a verdict of guilty as to counts 1, 4, 5, 6, 7 and 8 and not guilty as to counts 2 and 3 and defendant referred to probation officer.
Dec. 13, 1971	Court ordered defendant committed to custody of attorney general to count 1, of the indictment and 3 years each as to counts 4, 5, 6 and 8 to run concurrently with each other.
Dec. 14, 1971	Notice of appeal filed by Defendant.
Jan. 5, 1972	Defendant motioned for reduction of sentence and for release on bail pending appeal.
Feb. 7, 1972	Court ordered bond set pending appeal.
Feb. 24, 1972	Motion to modify judgment and for credit for time spent in jail pending trial which was denied.
Aug. 22, 1972	Opinion and judgment of the court of appeals for the ninth circuit.
Jan. 15, 1973	Motion for trial pending writ of certiorari to United States Supreme Court.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

March 1971

Grand Jury

No. 8572

INDICTMENT

Count One

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Nettie Lewis, 10031 Sunnybrae Avenue, Chatsworth, CA 91311, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Two

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles, County, within the Central District of California, defendant JAMES EDWARD BARNES unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Albert W. Young, Box 6525, Los Angeles, California 90055, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Three

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES BARNES, unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Arthur O. Salazar, Box 5737, Metro Sta, Los Angeles, California 90055, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Four

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Mary O. Hernandez, for children of Alfred P. Hernandez, P.O. Box 5034, Los Angeles, California 90055, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Five

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES knowingly and wilfully forged on United States Treasury Check number 43,495,044 dated July 1, 1971, in the amount of \$269.02, the endorsement and signature of the payee, Nettie Lewis, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

Count Six

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, knowingly and wilfully forged on United States, uttered and published as true United States Treasury Check number 43,495,044, dated July 1, 1971, in the amount of \$269.02, bearing the purported endorsement of the payee, Nettie Lewis, which endorsement was forged, as the defendant then and there well knew.

Count Seven

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, knowingly and wilfully forged on United States Treasury Check number 92,566,712, dated July 3, 1971, in the amount of \$268.80, the endorsement and

signature of the payee, Mary O. Hernandez, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

Count Eight

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, with intent to defraud the United States, uttered and published as true United States Treasury Check number 92,566,712, dated July 3, 1971, in the amount of \$268.80, bearing the purported endorsement of the payee, Mary O. Hernandez, which endorsement was forged, as the defendant then and there well knew.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF,

—V—

JAMES EDWARD BARNES, DEFENDANT.

No. 8572-CD

APPEARANCES:

FOR UNITED STATES OF AMERICA:

ROBERT L. MEYERS, *United States Attorney*, Los Angeles, CA by:

RICHARD A. STILZ,
Assistant United States Attorney

FOR JAMES EDWARD BARNES:

MALCOLM H. MACKEY
215 W. Fifth St., Suite 1011
Los Angeles, CA 90013

STIPULATION BETWEEN RICHARD A. STILZ AND
MALCOLM H. MACKEY

—0—

[Trans. Vol. 2, p. 15-16]

MR. STILZ: . . . Ladies and gentlemen of the jury, this is a stipulation signed by the Government, by the defendant and his counsel. It reads as follows:

"It is hereby stipulated by and between plaintiff, United States of America by its counsel of record, and defendant James Edward Barnes by his counsel of record as follows:

"That on or about July 1, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 43,495,044, in the sum of \$269.02 to Nettie Lewis at 10031 Sunnybrae Avenue, Chatsworth, California 91311;

"That on or about July 3, 1971, the United States

Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 92,566,712, in the sum of \$268.80 to Mary O. Hernandez for the children of Alfred P. Hernandez at P.O. Box 5034, Los Angeles, California 90055."

STENOGRAPHIC TRANSCRIPT OF NETTIE LEWIS' TESTIMONY:

[Trans. Vol. 2, p. 17-20]

DIRECT EXAMINATION
By MR. STILZ:

Q. Mrs. Lewis, on or about the months of June and July of this year were you a recipient of checks from the United States Government?

A. Yes.

Q. What was the purpose for the Government sending you these checks?

A. I was employed by the Federal Government and retired therefrom.

Q. Would they be retirement checks?

A. That is right.

Q. What is the approximate amount of each of these checks?

A. \$269.

Q. How often did they come?

A. Once a month.

Q. When would your check for June come, would it come at the end of June or the beginning of July?

A. The end of June. I would receive them around the first though sometimes.

Q. Is it your testimony that they come at the end of June or the beginning of July?

A. The beginning of July.

Q. Where were these checks sent to you in June or July, what address?

A. Chatsworth, 10031 Sunnybrae Avenue.

Q. Did you receive your check from the Government for June?

A. No.

Q. Were you expecting the arrival of your June check?

A. Yes, of course.

Q. Have you ever authorized anyone to receive mail for you?

A. No.

Q. Have you ever authorized anyone to negotiate checks for you?

A. No.

Q. Do you know the defendant seated at counsel table in the blue shirt?

A. I don't know what to say. He looks like somebody that might have been working in that bank at that time.

Q. Do you know him personally?

A. No, not at all.

Q. Did you ever authorize the defendant to receive mail for you?

A. No.

Q. Did you ever at any time authorize the defendant to negotiate checks for you?

A. No.

MR. STILZ: May Government's Exhibit No. 2 be placed before the witness.

THE COURT: Yes.

(The exhibit referred to was passed to the witness.)

By MR. STILZ:

Q. Mrs. Lewis, I ask you to examine this Exhibit 2. Does this look like the United States Treasury check you got for annuity each month?

A. That's it.

Q. Is the person who this check is made out to you, you?

A. Yes.

Q. Is that your name appearing on the front of the check?

A. Yes.

Q. Is that the correct address that it was sent to in June or July?

A. Before I moved to Downey, yes, it was being sent there.

Q. I ask you to look at the back side of this check. Do you see the signature of Nettie Lewis?

A. No.

Q. Isn't there a signature?

A. It is my name but not my signature.

Q. Do you see a signature on the back Nettie Lewis?

A. Yes.

Q. Is that your signature?

A. No.

MR. STILZ: I have no further questions, your Honor.

STENOGRAPHIC TRANSCRIPT OF MARY O.
HERNANDEZ' TESTIMONY:

[Trans. Vol. 2, p. 27-30]

DIRECT EXAMINATION

By MR. STILZ:

Q. Mrs. Hernandez, on or about the months of June or July of this year were you a recipient of checks from the United States Government?

A. Yes.

Q. What was the purpose of the United States Government sending you these checks?

A. They are Social Security benefits for my children.

Q. What is the approximate amount of each check they send you?

A. \$268.80.

Q. How often do these checks come?

A. Every month.

Q. Do they come at the beginning or at the end of the month?

A. The end of the month.

Q. Would it be your testimony that your check for June would come at the end of June or the beginning of July?

A. The beginning of July.

Q. Where were these checks sent to each month in June or July?

A. To my Post Office Box 5034.

Q. Is that in Los Angeles?

A. Yes, at Eighth and Broadway.

Q. Did you receive your Social Security check from the Government for June of this year?

A. No, I didn't.

Q. Were you expecting the arrival of your June check?

A. Yes.

Q. Did you ever authorize anyone to receive mail for you?

A. No.

Q. Have you ever authorized anyone to negotiate checks for you?

A. No.

Q. Do you know the defendant seated at counsel table in blue?

A. No.

Q. Did you ever authorize the defendant to receive mail for you?

A. No, sir.

Q. Have you ever at any time authorized the defendant to negotiate checks for you?

A. No.

MR. STILZ: I ask at this time Government's Exhibit No. 5 for identification be place before the witness.

(The exhibit referred to was passed to the witness.)

By MR. STILZ:

Q. Mrs. Hernandez, I ask you to look at the exhibit and examine it. Does this look like the Social Security check you get from the Government each month?

A. Yes.

Q. Is the person who this check is made out to you?

A. Yes.

Q. Is the correct address appearing on the front of this check?

A. Yes.

Q. I ask you to look at the back side of this check. Do you see the signature Mary O. Hernandez?

A. Yes.

Q. Is that your signature?

A. It is my name but not my signature.

Q. Did you sign Mary O. Hernandez there?

A. No.

Q. Did you ever authorize anyone to sign that signature on the back of that check?

A. No.

STENOGRAPHIC TRANSCRIPT OF ELEANOR FERRELL'S TESTIMONY:

[Trans. Vol. 2, p. 30-31]

DIRECT EXAMINATION

By MR. STILZ:

Q. Mrs. Ferrell, on or about June 2, 1971 for whom were you employed?

A. Crocker National Bank at 2745 West Manchester in Inglewood.

Q. In what capacity?

A. Clerk-steno.

Q. Were you working on June 2, 1971, in this bank?

A. Yes.

Q. On this date, which is June 2, 1971, did a man open up an account at your bank under the name of Clarence Smith?

A. Yes.

Q. Is that man present in court today?

A. Yes.

Q. Would you please identify him?

A. He is sitting there in the blue shirt.

MR. STILZ: May the record reflect the witness has identified the defendant?

THE COURT: Yes.

By MR. STILZ:

Q. What transpired at the time the account was opened by the defendant?

A. Well, he came to the new accounts counter and wanted to open a checking account. He was given a standard form for opening up the account and he filled them out and signed the back of it and made a deposit.

Q. What name did he use?

A. Clarence Smith.

Q. Is this the name you know him by?

A. Yes.

STENOGRAPHIC TRANSCRIPT OF ELMA DANAT'S TESTIMONY:

[Trans. Vol. 2, p. 33-35]

DIRECT EXAMINATION

By MR. STILZ:

Q. Miss Danat, directing your attention back to July 8th of this year, by whom were you employed?

A. Crocker National Bank at Western and Third.

Q. Were these the four United States Treasury checks deposited by the defendant on July 8th?

A. Yes, they were.

Q. How can you tell that these are the four checks?

Q. So you know definitely that the defendant deposited those four checks on July 8th?

A. Yes.

Q. At your branch?

A. Yes.

Q. When the defendant deposited these four checks, were they all endorsed with the purported signature of the payees?

A. Yes.

Q. Were they all second endorsed Clarence Smith?

A. Yes.

Q. Is it your testimony that the defendant deposited these four United States Treasury checks on July 8 of this year?

A. Yes.

STENOGRAPHIC TRANSCRIPT OF CHARLES P. NELSON:

[Trans. Vol. 2, p. 48-52]

DIRECT EXAMINATION

By MR. STILZ:

Q. Mr. Nelson, I will start back at the beginning of your testimony. By whom are you employed?

A. By the Post Office Department.

Q. In what capacity?

A. As a postal inspector.

Q. Were you so employed in that capacity on July 20, 1971?

A. Yes.

Q. On that date did there come a time when you had an interview and conversation with the defendant?

A. Yes.

Q. Who was present?

A. In addition to me Postal Inspector Jack Nelson and the defendant.

Q. Did you advise the defendant of his constitutional rights from Miranda prior to questioning him?

A. Yes, I did.

Q. What rights did you advise him of?

A. I told him that he had the right to remain silent, I

told him that anything he did say could later be used against him in court, and told him that he had the right to have an attorney present at any time and that if he was unable to afford an attorney the Government would appoint one for him, I told him that if he was willing to answer questions without an attorney present that he still had the right to stop answering at any time or decline to answer any certain questions.

Q. Do you recognize this exhibit?

A. Yes, I do.

Q. What is it?

A. It is what we refer to as a waiver of rights form. It has the rights I just mentioned up here on the top and a paragraph covering a waiver.

Q. Did the defendant sign this form?

A. Yes, he did.

Q. Did you sign it?

A. Yes.

Q. Did you see the defendant sign the form?

A. Yes, I did.

Q. After advising the defendant of his rights and the defendant waiving those rights, what did you say and what did the defendant say?

A. I asked him if he could give me any information regarding the Clarence Smith bank account and the four Treasury checks that are involved in this case. He told me that he had opened the Clarence Smith account at the Crocker Citizens Bank in Inglewood about the 1st of June. He said he was in the furniture business and that he had received the checks from what he referred to as dudes and chicks who went door to door selling furniture. He said the checks were signed when he received them.

I asked him if he had any data to prove that he had furniture orders. He said no, that they took their orders on scratch paper and that he did not have the orders. I asked him if he could identify the sales people. He told me that he could not.

I asked him if he had signed any of the payees' endorsements on the checks. He said, no, he hadn't that he only had signed the endorsement Clarence Smith and he acknowledged depositing them in the bank account.

STENOGRAPHIC TRANSCRIPT OF CHARLES P.
NELSON:

[Trans. Vol. 2, p. 53-55]

CROSS EXAMINATION
By MR. MACKEY:

Q. You had no problem getting cooperation from Clarence Smith, also known as Mr. Barnes?

A. No.

Q. And you asked him certain questions and he gave you certain answers, I take it?

A. Yes.

Q. He told you that he was operating a furniture business, did he tell you that?

A. Yes, he did.

Q. And did he say he operated his business at 3927 South Western Avenue in Los Angeles?

A. I can't recall if that is the address. I know he said it was an address on South Western.

Q. And that he was living at 4060 Buckingham, did he tell you that?

A. Yes.

Q. And that he worked out of his office selling furniture from brochures?

A. Yes, that is right.

Q. That when he said dudes and chicks he was using a colloquial term, I guess, as to men and women who were going from door to door for him?

A. That is what I assumed, yes.

Q. And that they brought back checks to him?

A. Yes.

Q. And that these people worked and wrote their orders on scratch pads, did he tell you that?

A. He referred to scratch paper.

Q. But that he didn't have any order forms at that time?

A. Yes.

Q. He admitted signing Clarence Smith to all these checks, did he not?

A. Yes, he did.

Q. But did he deny that he signed the payees' names, Nettie Lewis or Salazar, the people who were here previously.

A. Yes, that is true.

Q. Did he also tell you that he had an account at the First Western Bank on Santa Barbara?

A. I remember him telling me he had an account at the First Western Bank. I can't tell whether it was on Santa Barbara or not.

Q. He also acknowledged making the deposit slip in the Crocker Citizens Bank?

A. Yes, he did.

MR. MACKEY: That is all I have, your Honor.

STENOGRAPHIC TRANSCRIPT OF GEORGE W. LEWIS:

[Trans. Vol. 2, p. 58-59]

DIRECT EXAMINATION
By MR. STILZ:

Q. Did you use these handwriting exemplars in the analysis and comparison of the defendant's handwritings?

A. Yes, I did.

Q. What did you compare these exemplars to?

A. To the four United States Treasury checks, which are Exhibits 2 through 5.

Q. As a result of your examination and based on your training and experience have you reached a conclusion?

A. Yes, I have.

Q. What is the conclusion?

A. It is my conclusion that the Nettie Lewis signature on Exhibit 2 was written by Mr. Barnes, and it is also my conclusion that the Mary O. Hernandez signature on Exhibit 5 was written by Mr. Barnes.

And it again is my opinion that the four Clarence Smith second endorsements on the four Treasury checks, which are Exhibits 2 through 5, were also written by Mr. Barnes.

* * * *

JURY INSTRUCTIONS

[Trans. Vol. 2, p. 115]

1. It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

[Trans. Vol. 2, p. 117-118]

2. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

A presumption is a rule of law which permits the jury to find the existence of one fact from proof of another fact.

A presumption may be overcome by evidence. Your duty is to determine the facts on the basis of all of the evidence.

[Trans. Vol. 2, p. 120]

3. As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

[Trans. Vol. 2, p. 121-122]

4. Title 18, United States Code, Section 1708 provided in part:

"Whoever . . . has in his possession any letter . . . knowing the same to have been stolen, taken or embezzled or abstracted . . ." shall be guilty of an offense against the United States Government.

Three essential elements are required to be proved in order to establish the offense charged in Counts 1 through 4 of the indictment:

FIRST: The act or acts of unlawfully having in one's possession the contents of a letter, namely, the United States Treasury checks as alleged;

SECOND: That the contents of the letter, namely, the United States Treasury checks as alleged, were stolen from the mail; and

JURY INSTRUCTIONS CONT'D.

THIRD: That the defendant James Edward Barnes knew the contents had been stolen.

[Trans. Vol. 2, p. 123-124]

5. Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's.

• • • •

6. Title 18, United States Code, Section 495, provides in part:

"Whoever falsely makes, alters, forges, or counterfeits any . . . writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, any officers or agents thereof, any sum of money; or

JURY INSTRUCTIONS CONT'D.

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited . . ." shall be guilty of an offense against the laws of the United States.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF,

—V—

JAMES EDWARD BARNES, DEFENDANT.

No. 8572

VERDICT

The jury in the above-entitled case, found the defendant,
JAMES EDWARD BARNES, guilty as charged in Counts
1, 4, 5, 6, 7, 8, and *not* guilty in Counts 2 and 3.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

—vs—

JAMES EDWARD BARNES, DEFENDANT-APPELLANT.

No. 72-1106

[August 22, 1972]

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIF.

Before: BROWNING, ELY, and KILKENNY, *Circuit Judges*.

ELY, *Circuit Judge*:

Barnes appeals from his conviction, by a jury, on six charges arising out of his alleged efforts to forge and utter stolen United States Treasury checks. Two of the counts related to Barnes' possession of stolen mail (i.e., the checks), in violation of 18 U.S.C. § 1708. The other four concerned violations of 18 U.S.C. § 495, two for forging endorsements on the checks, and two for depositing those forged instruments into a bank account. Barnes challenges all six convictions.

Those under section 1708 are attacked on two grounds. First, Barnes contends that the evidence was insufficient. There is no merit to this contention. At trial the prosecution demonstrated, or Barnes conceded, that (1) the checks involved were stolen from the mails between July 1st and 8th, 1971; (2) on July 8, 1971, Barnes deposited the checks in an account opened only a month earlier under the name of "Clarence Smith," and (3) both the payees' and "Smith's" endorsements were written by Barnes. When this evidence is viewed, as it must be, in the light most favorable to the Government, it is more than adequate to sustain the prosecution's case. The jury could justifiably determine from his actions, that Barnes knew the checks had been stolen; thus, the conviction was supported by the evidence. See *United States v. Gardner*, 454 F.2d 534 (9th Cir. 1972).

Barnes' other argument is that the District Court erred in instructing the jury that it might infer, from the fact that Barnes possessed recently stolen checks, that he knew they had been stolen.¹ He argues that that instruction, upon which the jury may have relied in reaching the guilty verdicts, violates both his Fifth Amendment due process rights and his privilege against self-incrimination. Under his theory, the former were violated because the allowed inference not only shifted the burden of proof on the issue of knowledge from the Government to him, but also that it does not reflect the required nexus between the fact proved and the fact inferred. Cf. *United States v. Leary*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969). The privilege against self-incrimination was infringed, argues Barnes, because the jury was permitted, by the terms of the instruction, to infer Barnes' guilt from his silence.

¹ The challenged instruction reads:

"possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen."

"However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property."

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession."

"If you find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen and that while recently stolen, the contents of said mail here, the four U.S. Treasury checks, were in the possession of the defendant, you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property; unless such possession is explained by facts and circumstances in this case which are in some way consistent with defendant's innocence."

"Possession may be satisfactorily explained through other circumstances other evidence, independent of any testimony of the accused."

This instruction is functionally identical to that recently analyzed and condemned in *United States v. Cameron*, ——F.2d—— No. 71-3138 (5th Cir. June 1, 1972), see text, infra.

Although Barnes is supported in his latter contentions by a case recently decided by our Brothers of the Fifth Circuit, *United States v. Cameron*, — F.2d — No. 71-3138 (5th Cir. June 1, 1972), we cannot accept his views for two reasons. First, a contrary rule has already been established by our court. The challenged instruction and the inference it permits have been generally approved. See, e.g., *United States v. Gardner*, *supra*. Secondly, we can see no substantial basis for holding, as Barnes suggests we should, that as a matter of law, the District Court should have rejected the inference instruction because of the weakness of any proved connection between the theft and Barnes' subsequent possession. While, in some circumstances, such rejection might be required (Cf. *United States v. Leary*, *supra*), we cannot here hold that permitting the jury to infer knowledge from Barnes' possession was impermissible because of any "lack of a rational connection between [them] in common experience." *Tot v. United States*, 319 U.S. 463, 467-68, 87 L.Ed. 1519, 63 S. Ct. 1241 (1943). See also *Leary v. United States*, *supra*, at 30-36, 23 L.Ed.2d 57, 89 S. Ct. 1532 (1969).

Since Barnes received concurrent sentences on all six counts, we need not and do not, consider whether any of the others is susceptible to the various attacks that Barnes makes. See, e.g., *United States v. Moore*, 452 F.2d 576 (9th Cir. 1971).

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 72-5443

JAMES EDWARD BARNES, PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein
in forma pauperis and of the petition for writ of certiorari,
it is ordered by this Court that the motion to proceed in
forma pauperis be, and the same is hereby, granted; and
that the petition for writ of certiorari be, and the same is
hereby, granted.

DECEMBER 4, 1972